



## **DEPARTMENT OF COMMERCE**

### **Bureau of Industry and Security**

#### **15 CFR Part 766**

**[Docket No. 220930-9998]**

**RIN 0694-AI91**

### **Export Administration Regulations: Guidance on Penalty Determinations in the Settlement of Administrative Enforcement Cases Involving Antiboycott Matters**

**AGENCY:** Bureau of Industry and Security, Department of Commerce.

**ACTION:** Final rule.

**SUMMARY:** In this final rule, the Bureau of Industry and Security (BIS) amends a supplement to the Export Administration Regulations (EAR) that sets forth guidance regarding BIS's penalty determinations in the settlement of administrative enforcement cases involving violations of the antiboycott provisions of the EAR. This amendment clarifies and realigns such guidance with current boycott-related activity and BIS's priorities and charging practices. BIS also updates the reference to the statutory authority for the EAR's antiboycott provisions.

**DATES:** This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Cathleen Ryan, Director, Office of Antiboycott Compliance, Bureau of Industry and Security, U.S. Department of Commerce, by email at [OAC.WebQueries@bis.doc.gov](mailto:OAC.WebQueries@bis.doc.gov) or [OACINQUIRIES@bis.doc.gov](mailto:OACINQUIRIES@bis.doc.gov), or by phone at 202-482-2381.

### **SUPPLEMENTARY INFORMATION:**

#### **Background**

Supplement No 2 to Part 766 - (Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases Involving Antiboycott Matters) ("Antiboycott Penalty

Guidance”), a supplement added to the EAR in July 2007, describes how BIS’s Office of Antiboycott Compliance (OAC) responds to violations of part 760 of the EAR (“Restrictive Trade Practices or Boycotts”) and to violations of related recordkeeping requirements set forth in part 762 of the EAR (“Recordkeeping”) (together, “the antiboycott provisions of the EAR”). Paragraph (d) of the Antiboycott Penalty Guidance specifies how BIS determines the appropriate sanctions in the settlement of administrative enforcement cases involving violations of the antiboycott provisions of the EAR.

In this final rule, BIS revises paragraph (d)(1)(ii) – Category of Violations, which categorizes violations by the seriousness of the alleged violations. Based on administrative antiboycott enforcement cases pursued in recent years under new statutory authority, the Export Control Reform Act of 2018 (50 U.S.C. 4801-4852), specifically, Part II (the Anti-Boycott Act of 2018), and current boycott-related trends and conditions, it is BIS’s view that certain of the violations specified under Categories A and B in paragraph (d) do not accurately reflect BIS’s current antiboycott enforcement priorities and practices or the agency’s assessment of the seriousness of the alleged violations.

Accordingly, as detailed below, this rule makes certain revisions and clarifications to Categories A and B. By making these revisions, this amendment updates the two categories to better comport with current boycott-related activity and to better align BIS’s penalty determinations with the agency’s view of the seriousness of the alleged violations. BIS has revised Category A to include only those violations deemed the most serious; these violations will ordinarily warrant the maximum penalty available under the Anti-Boycott Act of 2018. BIS has also revised Category B, reflecting shifting trends in boycott activity, to include violations that most commonly and currently arise in commercial transactions in a boycott context; these violations will be the focus of OAC’s antiboycott enforcement and subject to enhanced penalties to discourage cooperation with boycott-related requirements and to promote awareness, accountability and deterrence.

Specifically, consistent with these policy considerations, this rule moves certain violations from Category B to Category A and moves other violations from Category A to Category B. It also clarifies the references to certain violations. This rule does not make any revisions to Category C.

#### **Section 760.2(a) (Refusals to do business)**

Section 760.2(a) (Refusals to do business) of the EAR is a prohibition that may take one of four forms identified in paragraph (a)(1). BIS will continue to classify the first of these forms, refusing to do business, as a Category A violation. However, this rule moves the second form of this prohibition, knowingly agreeing to refuse to do business, from Category A to B, and also corrects the inadvertent omission of the word "knowingly" in the former reference at paragraph (d)(1)(ii)(A)(2) of Supp. No. 2 to part 766. Additionally, this rule makes clarifying additions to Category B by adding in specific references to the two other forms that Section 760.2(a)(1) may take, namely, requiring, or knowingly agreeing to require, any other person to refuse to do business. These clarifying additions reflect BIS's longstanding assessment of these two forms of the prohibition as Category B violations.

#### **Furnishing information about associations with charitable or fraternal organizations which support a boycotted country - § 760.2(e)**

This rule moves this violation from Category B to A.

#### **Implementing letters of credit - § 760.2(f)**

This rule moves this violation from Category A to B.

#### **Furnishing information about business relationships with boycotted countries or blacklisted persons - § 760.2(d)**

This rule moves this violation from Category A to B.

These revisions and clarifications are intended to increase transparency and add clarity to the administrative enforcement process with respect to violations of the antiboycott provisions of the EAR and, in turn, to incentivize compliance and strengthen deterrence.

Additionally, this rule makes a technical amendment to the introductory paragraph of (b) of Supplement No. 2 to Part 766. Specifically, it replaces the outdated reference to Section 8 of the Export Administration Act of 1979, as amended, with a reference to the Export Control Reform Act of 2018, the current statutory authority for the antiboycott provisions of the EAR.

### **Export Control Reform Act of 2018**

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801-4852). Part II of ECRA contains the Anti-Boycott Act of 2018. ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule.

### **Rulemaking Requirements**

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been designated as not significant for purposes of Executive Order 12866.

2. This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

3. Pursuant to section 1762 of the Export Control Reform Act of 2018 (50 U.S.C. 4821), this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

4. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical

requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, are not applicable.

Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

5. Notwithstanding any other provision of law, no person may be required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves a collection currently approved by OMB under control number 0694-0012, Report of Requests for Restrictive Trade Practice or Boycott – Single or Multiple Transactions. The collection carries a burden estimate of 60 to 90 minutes for a manual or electronic submission for a total burden estimate of 482 hours. BIS expects the burden hours associated with this collection to not to be impacted with the publication of this rule.

#### **List of Subjects in 15 CFR Part 766**

Administrative practice and procedure, Confidential business information, Exports, Law enforcement, Penalties.

Accordingly, part 766 of the Export Administration Regulations (15 CFR parts 730-774) is amended as follows:

#### **PART 766 – ADMINISTRATIVE ENFORCEMENT PROCEEDINGS**

1. The authority citation for part 766 continues to read as follows:

**Authority:** 50 U.S.C. 4801-4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*;  
E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

2. Supplement no. 2 to part 766 is amended by revising paragraph (b) introductory text and paragraph (d)(1)(ii) to read as follows:

**Supplement No. 2 to Part 766 – Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases Involving Antiboycott Matters**

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*(b) Responding to Violations.*

OAC within BIS investigates possible violations of the Anti-Boycott Act of 2018, the antiboycott provisions of the EAR, or any order or authorization related thereto. When BIS has reason to believe that such a violation has occurred, BIS may issue a warning letter or initiate an administrative enforcement proceeding. A violation may also be referred to the Department of Justice for criminal prosecution.

\* \* \* \* \*

*(d) How BIS determines what sanctions are appropriate in a settlement.*

(1) General Factors. BIS looks to the following general factors in determining what administrative sanctions are appropriate in each settlement.

(i) Degree of seriousness. In order to violate the antiboycott provisions of the EAR, a U.S. person does not need to have actual “knowledge” or a reason to know, as that term is defined in § 772.1 of the EAR, of relevant U.S. laws and regulations. Typically, in cases that do not involve knowing violations, BIS will seek a settlement for payment of a civil penalty (unless the matter is resolved with a warning letter). However, in cases involving knowing violations, conscious disregard of the antiboycott provisions, or other such serious violations (e.g., furnishing prohibited information in response to a boycott questionnaire with knowledge that such furnishing is in violation of the EAR), BIS is more likely to seek a denial of export privileges or an exclusion from practice, and/or a greater monetary penalty as BIS considers such violations particularly egregious.

(ii) Category of violations. In connection with its activities described in paragraph (a)(1) of this supplement, BIS recognizes three categories of violations under the antiboycott provisions of the EAR. (See § 760.2, § 760.4 and § 760.5 of the EAR for examples of each type of violation other than recordkeeping). These categories reflect the relative seriousness of a violation, with

Category A violations typically warranting the most stringent penalties, including up to the maximum monetary penalty, a denial order and/or an exclusion order. Through providing these categories in this penalty guidelines notice, BIS hopes to give parties a general sense of how it views the seriousness of various violations. This guidance, however, does not confer any right or impose any obligation as to what penalties BIS may impose based on its review of the specific facts of a case.

(A) The Category A violations and the sections of the EAR that set forth their elements are:

(1) Discriminating against U.S. persons on the basis of race, religion, sex, or national origin - § 760.2(b);

(2) Refusing to do business - § 760.2(a);

(3) Furnishing information about race, religion, sex or national origin of U.S. persons including, but not limited to, providing information in connection with a boycott questionnaire about the religion of employees – 760.2(c).

(4) Evading the provisions of part 760 - § 760.4; and

(5) Furnishing information about associations with charitable or fraternal organizations which support a boycotted country - § 760.2(e).

(B) The Category B violations and the sections of the EAR that set forth their elements are:

(1) Knowingly agreeing to refuse to do business - § 760.2(a);

(2) Requiring, or knowingly agreeing to require, any other person to refuse to do business - § 760.2(a);

(3) Implementing letters of credit - § 760.2(f);

(4) Furnishing information about business relationships with boycotted countries or blacklisted persons - § 760.2(d); and

(5) Making recordkeeping violations - part 762.

(C) The Category C violation and the section of the EAR that sets forth its elements is: Failing to report timely receipt of boycott requests - § 760.5.

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